JURISDICTION

The judgment of the court of appeals (Pet. App. F, pp. 90A–91A) was issued on March 4, 1966, and a timely petition for rehearing denied on June 8, 1966. The petition for a writ of certiorari was filed on August 31, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Commission acted within its authority in requiring the licensee of a hydroelectric project to defray less than 100 percent of the continuing costs of operating and maintaining fishery facilities that the Commission, as a condition of the license, required it to construct and to convey to the State where the facilities are located.[1]

STATEMENT

Prior to the proceedings in which the orders involved here were issued, Pacific Power & Light Company was awarded a license by the Federal Power Commission to construct the Iron Gate hydroelectric development on the Klamath River in California (R. 347–348).[2] One purpose of Iron Gate (besides generation of electric energy) was to remove the dangers to human life, and end the destruction of fish, caused

[1] Certain "subsidiary" questions are listed in the petition but not discussed.

[2] "R." references are to the two-volume Joint Appendix in the court of appeals filed in this Court with the Department's petition for certiorari to review the court of appeals' first decision, No. 648, O.T., 1964 (certiorari denied, 379 U.S. 969), and made a part of the record by the court below in the second review proceeding (Pet. App. F, pp. 101A–102A).

by the operation of licensee's upstream plants (Pet. App. A, pp. 4A–5A; R. 14–15, 21–22). The Commission inserted in the license conditions relating to a fish hatchery and fish-trapping and egg-collecting facilities (Pet. App. A, pp. 5A–6A), requiring the construction of egg-taking facilities to be conveyed to the Department of Fish and Game of the State of California but reserving other fish-facility questions for future hearing and decision (Pet. App. A, p. 5A). Following issuance of the license, construction of the Iron Gate development and the egg-taking facilities was undertaken and completed, the hydroelectric facilities were placed in operation (Pet. App. A, pp. 6A–7A), and the egg-taking facilities were conveyed to the State (Pet. App. A, pp. 30A–31A).

The present proceedings were initiated by the Department's request to the Commission that construction of a hatchery also be required of the licensee (Pet. App. A, p. 2A). The Commission complied, but provided that the licensee need reimburse the Department for only 80 percent of the expense of operating and maintaining both the new hatchery and the egg-taking facilities previously conveyed to the Department (Pet. App. A, pp. 17A–18A). Conveyance of the hatchery to the Department was implicit in the requirement that the Department be "reimbursed" for a portion of the expenses (Pet. App. C, p. 72A).

Both the licensee and the Department filed petitions for review in the Court of Appeals for the Ninth Circuit. There, the Department complained, *inter alia*, of the Commission's failure to require the licensee to

reimburse it for 100 percent of the expenses and the licensee complained of being required to pay any part, which, it contended, was contrary to a written agreement previously entered into between it and the Department in settlement of prolonged litigation over the licensee's use of the river. With respect to the hatchery, the court upheld the reimbursement requirement but found the order unclear on whether the required reimbursement was 80 percent of the actual cost of operation or 80 percent of the cost of operation at full capacity. With respect to the egg-taking facilities, the court held that the Department had agreed to bear those expenses and that, although the Federal Power Commission was not bound by that agreement, it could not shift that burden to the licensee without a finding that there were sound reasons for overriding the contract. It therefore remanded the case to the Commission for further proceedings (Pet. App. C, pp. 63A–81A; 333 F. 2d 689, certiorari denied, 379 U.S. 969).

On remand, the Commission, in a unanimous decision, clarified its original order by making explicit that the licensee must reimburse the Department for 80 percent of the actual expenses whether or not the hatchery was actually operating at its full capacity (Pet. App. D, p. 84A). On rehearing the Commission also noted (again unanimously) its agreement with the court of appeals that the licensee need not reimburse any part of the expenses of operating and maintaining the egg-taking facilities (Pet. App. E, pp. 88A–89A).

Petitioner again sought review in the Court of Appeals for the Ninth Circuit, which affirmed the Commission's orders issued following the remand (Pet. App. F, pp. 97A, 101A).

ARGUMENT

Petitioner argues that the Commission is in all circumstances required to impose upon a licensee the entire cost of operating and maintaining any facilities that the Commission requires the licensee to construct as a condition of the license. However, Section 10(a) of the Federal Power Act, the only relevant provision, merely provides that the Commission shall license power projects "best adapted to a comprehensive plan for improving or developing a waterway or waterways" and prescribes no formula for the allocation of maintenance costs incurred in compliance with conditions inserted by the Commission in furtherance of the objectives of Section 10(a). There is no indication here that the Commission is wholly without discretion in this area. In general, the licensee is required by the Commission to bear all such costs. But there may be special circumstances which justify a deviation. The Commission deemed this such a case. The record indicated that the Iron Gate fish facilities would eliminate certain natural fluctuations in the river flow and thereby make the river more congenial to fish life than it would be in its natural state. The State was permitted to operate the facilities constructed by Pacific and thereby to maintain its traditional control over the fish life of the river. The State had historically operated and maintained fish

facilities at its own expense (Pet. App. A, p. 29) and was willing to assume a portion of the maintenance expenses involved here (Pet. 9, n. 9). Moreover, the State is no less vitally interested than the federal government in the preservation of these resources.

In the circumstances, we submit that the Commission was not arbitrary in limiting the licensee's maintenance obligation to 80 percent. Since the case turns on its particular facts, review by this Court is not warranted. We point out that if the State assumes 20 percent of the expense of maintaining and operating the fish hatchery, the cost to it will be only about $10,000 a year (Pet. App. A, p. 7A). Thus the Department does not, and could not reasonably, contend that this case is in itself of major economic significance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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